Special Cases Arising in Interference Proceedings

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Introduction.

The general practice in interference cases, as the same arise in the Patent Office, is now fairly well established, and may be understood from the Rules of Practice and from the published decisions and text-books. But special cases and unusual questions frequently arise, and the decisions upon these, though not always reported, nevertheless form precedents for subsequent cases involving similar questions. A few of such special cases have been selected for discussion in this paper.

Order of Parties.

The principal examiner in preparing the notices for interferences is required to arrange the applications in the inverse chronological order of the filing of the particular applications involved (Rule 97; and Raulet and Nicholson *vs.* Adams, 114 O. G., 1827; 1905 C. D., 55). However, if any application is clearly a division or continuation of some earlier application he is required to so state in the notice to the Examiner of Interferences, in order that the latter may take cognizance thereof and fix the burden of proof with that fact in mind. But if the principal examiner is in doubt whether a particular application is in fact a division or continuation of another, he makes no mention of such earlier case, leaving the point to be raised by formal motion to shift the burden of proof on behalf of the party seeking advantage of

such application (Jackson *vs.* Patten, 150 O. G., 265; 1910 C. D., 2).

Cases Filed on Same Day.

It sometimes happens, however, that two applications claiming the same patentable invention are filed on the same day. While these cases are not numerous, several instances have occurred in the last few years. The fact that one application bears a higher serial number than another filed on the same day indicates nothing, for the numbering of applications filed in the Office on any given date is largely a matter of chance. Moreover, fractions of a day are not recognized by the Patent Office in the filing of papers. The numbers of such applications are therefore not a guide in fixing the burden of proof, since they constitute no proper reason for regarding either party as senior with respect to the other. The applications are in fact regarded as having been filed simultaneously. In order that the burden of proof may be based upon some act of the parties themselves, it is the practice to place the burden upon him who last executed his application, and such applications are therefore arranged in the inverse chronological order of the dates upon which the same were executed.

Priority Awarded to First to Conceive Where Reduction to Practice is Simultaneous.

A case such as the above may present a novel situation when the same comes on for determination upon proofs. The general rule is that priority is awarded to the party who first completes and demonstrates the practicability of his invention, or who first constructively reduces to practice by filing an application; except where another, who was the first to conceive was exercising diligence in perfecting his invention at the time his rival entered the field, and continued diligent until his own reduction to practice, either actual or constructive. But where no actual reduction to practice is proved by either party, and each is restricted for this act to his filing date, the reductions to practice, while constructive, are simultaneous, and it is necessary to determine by other means which of the two parties is entitled to the award of priority.

Only one instance in which this question has been seriously presented has been discovered. In that case, while both parties took testimony, neither actually reduced to practice, and the evidence was held to show prior conception by the senior party. It could not be said that he was the first to conceive and the first to reduce to practice, because the reductions to practice were simultaneous. It was held, however, that priority should be awarded to the party who proved an earlier conception. While in that case the judgment was in favor of the senior party, the theory upon which the judgment was rendered would appear to apply to either party, and if the junior party had proved the earlier conception, the judgment would probably have been in the latter's favor. In other words, it is the sense of that decision that, as between two parties standing on an equal basis as to their reduction to practice, the award should be in favor of him who first conceived the invention. No question of diligence seems to have been presented in that case, but it is believed that the same conclusion would have been reached irrespective of any question of diligence which might have been presented. In arriving at their decision the Examiner of Interferences and the examiners-in-chief appear to have been guided, to some extent at least, by the decision in the case of Smith *vs.* Foley *vs.* Anderson *vs.* Smith (136 O. G., 847; 1908 C. D., 210). In that case the applications of Foley and Anderson were filed on the same day. As between these parties there seems to have been no serious contest; but the decision of the Commissioner contains the statement that since neither had proved actual reduction to practice, Foley was entitled to prevail. This prior decision in the case of Smith *vs.* Foley *vs.* Anderson *vs.* Smith, *supra*, was not referred to by the Commissioner in his decision in the above mentioned case which has more recently been before the Office for determination, but he affirmed the decision of the Examiners-in-Chief as to all points. An appeal has been taken to the Court of Appeals of the District of Columbia, and the holding of the Commissioner upon this point has been urged as one of the grounds of appeal.

Identical Dates.

In the case last referred to the parties were claiming the same record date for constructive reduction to practice. Another interesting case involving a similar situation arose a few years ago with respect to record evidence. Section 4887 of the Revised Statutes particularly provides that an application for patent filed in this country by a person who has regularly filed an application for the same invention in a foreign country (if an adherent to the International Convention) shall have the same force and effect as the application would have had if it had been filed in this country on the date it was filed in the foreign country, provided the application was filed in the United States within twelve months from the earliest foreign filing date. In the case referred to the applications in the United States were filed on different dates, but each party had filed an application in Germany for the same invention as that embodied in his United States application, and it so happened that these applications were filed on the same date. Since the benefit accruing under the statute is based solely upon the filing of the application, no evidence of any earlier act by either party, such as conception or actual reduction to practice, could be accepted. No evidence was introduced as to any acts of invention in this country, and the case had to be decided on the rights of the parties as established by their foreign applications. Here then the parties not only were entitled to the same date for constructive reduction to practice, but they were likewise both restricted to this same date for conception of the invention. In other words, the parties were both entitled to the same date for conception and to the same and the identical date for constructive reduction to practice. The Examiner of Interferences took the position that the burden of proof was properly upon the party last to file his United States application, and his opponent, being the first to present in this country an allowable application, was in the eyes of the law entitled to a patent therefor, unless the later to file proved a superior right. Inasmuch as the only evidence presented by either party was that of the filing of his German application, it was held that, since the junior

party had established a right only equal to that of the senior party, he had failed to sustain the burden resting upon him, and priority was awarded to the senior party, the first to file in the United States. Appeal was taken to the Examiners-in-Chief. That tribunal was of the opinion that, notwithstanding the fact the German applications were filed on the same day, the records of the German Patent Office ought to disclose which of the two applications was in fact first presented. The Examiners-in-Chief recommended to the Commissioner that the case be remanded to the Examiner of Interferences with directions to call for evidence upon this point. The parties were required to secure the additional evidence, but when again presented the evidence failed to give any more definite data than that originally supplied. The case was therefore again decided in favor of the party who first filed his application in the United States. The decision became final without appeal.

Right to Make Claims.

Since the decision of the Court of Appeals of the District of Columbia in the case of Podelsak and Podelsak *vs.* McInnerney (1906 C. D., 558; 26 App. D. C., 399) the question of the right of any party to make claims corresponding to the issue has been considered as a question ancillary to that of priority of invention proper. Many such cases have been presented, and when it is found that one of the parties can not make such claims, priority is awarded to his opponent. Cases have arisen, however, in which it has been found that the claims as presented will not read upon the application of any party to the proceeding. While such cases are unusual, two instances have occurred to the writer's knowledge. With such a situation no award of priority can be made to either party, and it might at first appear that such an interference should be dissolved. When the first case arose such a recommendation was made to the Commissioner. After hearing the parties he declined, however, to dissolve the proceeding, and remanded the same to the Examiner of Interferences with directions to enter a judgment to the effect that neither of the parties was entitled to make the claims, and therefore neither was the inventor of the subject-matter

in issue. This action was taken on the theory that the appellate tribunals might come to a different conclusion as to one of the applicants, and if it should be eventually held that either could make the claims, a true case of priority would be at once presented.

In the second case, which was but recently presented, a similar judgment was entered.

Patent Invalid. Dissolution.

This unusual case was once presented. An interference was declared between an application of one party and a patent to another based upon an application filed subsequent to the filing date of the first party. The patentee being the last to file was made the junior party and was required to prove his case over that of the applicant. Inasmuch as one party was a patentee the only question to be determined ultimately was the right of the other party to a patent. The patentee claimed the benefit under the International Convention of the filing date of a certain German patent. It at once appeared that the application upon which the German patent was based was filed in Germany more than one year before the patentee's application was filed in this country, and, further, that the German patent issued before the United States patent was granted. It was thus apparent that the United States patent was invalid. Moreover, while the German patent invalidated the United States patent based upon the same disclosure, the same was not a reference for the other party, because it was not sufficiently early to operate as a bar. In view of the fact that the patent was invalid, and since the patentee could not under his preliminary statement present any evidence other than his German application, there seemed to be no reason for the continuance of the interference. The proceeding was dissolved by order of the Commissioner, based upon the recommendation of the Examiner of Interferences.

Suspension.

It occasionally happens that infringement suits and interference proceedings between the same parties are running at the same time, as where one of the parties has obtained a patent and sues the other for infringement. Under Section 4920 of the Revised Statutes the defendant may

prove that the patentee was not the first inventor, and in doing so may prove that he himself was the real and true inventor. To some extent, therefore, the questions presented in the suit may be the same as those to be determined in the interference. The Office is sometimes asked to suspend the interference pending final determination of the suit. No suspension will however ordinarily be made. As was pointed out in the case of McBride *vs.* Kemp (109 O. G., 1069; 1904 C. D., 89), the statute particularly directs the tribunals of the Patent Office alone to determine the question of priority of invention between two or more parties each asking a patent for the same invention. Section 4904 of the Revised Statutes specifies when an interference should be declared, and directs that the Commissioner shall, when the proper circumstances arise, institute the proceeding. It requires that he shall direct the primary examiner (Examiner of Interferences) to determine the question of priority in the first instance, and provides for appeal to the Examiners-in-Chief and Commissioner. An appeal to the Court of Appeals of the District of Columbia is provided by a later statute.

In view of the fact, therefore, that the statute particularly designates the method of determining interferences and provides no other, it would be useless to suspend the same, pending determination of a suit for infringement, in which the question at issue in the interference could be raised only incidentally or collaterally. Thus, while the Office is in no way bound by any court decision in an infringement suit even though substantially the same question may be presented, the principle of comity is always respected, and due deference given to decisions of such character. It not infrequently happens therefore that the tribunals of the Patent Office and the federal courts arrive at very different conclusions upon the same state of facts. A recent case is in point. A party Wright secured a patent. Some time after the issuance thereof another party, one Brownlee, filed an application for the same invention, and an interference was declared. The invention was a gas iron for laundry purposes. Before the interference was declared Wright sued Brownlee in the District Court for the Eastern District of Pennsylvania, for in-

fringement of his patent. The court held that the invention originated with the defendant Brownlee, and dismissed the suit (Wright *vs.* Brownlee et al., 205 F. R., 526). When the interference came on for final hearing, the Examiner of Interferences, while not regarding the case as free from doubt, likewise came to the conclusion that the invention was that of Brownlee, and decided with the trial court in the infringement case. Upon appeal to the Examiners-in-Chief this decision was reversed, and that tribunal held that Brownlee had failed to sustain the burden which was upon him to prove his case beyond a reasonable doubt, and reversed the decision of the Examiner of Interferences. In the meantime appeal was taken from the decision of the trial court in the infringement case, and the Circuit Court of Appeals for the Third Circuit, in a decision dated April 2, 1914, reversed the trial court, adopting almost in *toto* the language of the decision of the Examiners-in-Chief (Wright *vs.* Brownlee et al., 212 F. R., p. 157). The decision of the Examiners-in-Chief was affirmed by the Commissioner on appeal. No further appeal was taken.

Dissolution in Cases Well Advanced.

After an interference is well advanced, and particularly after proofs have been taken, the same will not ordinarily be terminated without a judgment. But in special cases a dissolution may be ordered without an award of priority, as where it very clearly appears that a statutory bar exists to the grant of a patent to one or more of the contesting parties (Neill *vs.* Commissioner of Patents, 82 O. G., 749; 11 App. D. C., 584; Oliver *vs.* Felbel, 100 O. G., 2384; 20 App. D. C., 255).

Dwiggins vs. Reid, Reid and Kelly.

The case of Dwiggins *vs.* Reid, Reid and Kelly, recently before the Office, developed an unusual and interesting situation. Both parties were applicants. The issue consisted of a large number of counts. Testimony was taken by both parties, and the case submitted for final disposition upon the record thus made. The Examiner of Interferences divided the issue, awarding certain of the counts to Dwiggins and the others to Reid, Reid and Kelly. The evidence showed, however, that Dwiggins had built, had publicly

used, and had sold a machine embodying certain counts of the issue many years before he filed his application. The machine was first sold in 1903 and used for nearly a year in the manufacture of fencing. It was then changed in some respects, and the use continued for a considerable period of time. In 1905 it was sold a second time, and the second purchaser continued to use it, with perhaps minor changes, until 1909. The Examiner of Interferences noticed the fact that the Dwiggins application was probably invalid for all counts which would read upon this early machine. He, however, awarded priority of invention as the evidence seemed to require, but followed the same with a recommendation to the Commissioner under Rule 126, directing his attention to the apparent statutory bar.

The Commissioner, however, thought that the oath made to the Dwiggins application partook of fraud, and concluded that under the circumstances Dwiggins was not entitled to an award of priority. He accordingly vacated the judgment of the Examiner of Interferences and directed that if appeal should be taken by Dwiggins as to the counts which had been awarded to Reid, Reid and Kelly, the Examiners-in-Chief should dismiss the appeal. The appeal was taken, and was dismissed by the Examiners-in-Chief as directed. Dwiggins then filed in the Supreme Court of the District of Columbia a petition for mandamus, asking that the Commissioner be directed to set aside the orders referred to. The petition was denied. Appeal was taken to the Court of Appeals of the District of Columbia, and the action of the lower court sustained (United States *ex rel.* Dwiggins *vs.* Ewing, Commissioner of Patents, 214 O. G., 1025).

Another case was recently presented in which the interference was likewise between two applications. When the evidence was considered, it clearly appeared that machines embodying the issue had been used by the junior party for nearly seven years prior to the filing of his application, and for four years prior to the filing of the senior party's application. It was apparent from the evidence that the junior party was the prior inventor, but inasmuch as the use of this party's early machines was apparently a bar to both parties, it

was concluded that the interference should be dissolved without an award to either party. Since the machine had been in public use for many years it was held that the junior party was not entitled to even a technical award of priority. It was therefore recommended that the interference be dissolved without a judgment, and an order to this effect was issued by the Commissioner.

Successive Interferences.

A second interference will not usually be declared between the same applications, or between new applications by the same parties relating to the same general invention. But a second interference is sometimes rendered necessary in order that the successful party in the first proceeding may secure the full benefit of the judgment in his favor, as where the losing party in the first case is permitted to go to patent with claims which should have been rejected upon the issue.

In an interference between K and W priority was awarded to the latter. K canceled the claims corresponding to the issue, and was permitted to go to patent with other claims which should have been rejected upon the issue. W went to patent without making claims corresponding to those remaining in K's application, but which clearly read upon his own disclosure and fell within his statement of invention. W filed a reissue application embodying the claims of K's patent and demanded a second interference. The interference was declared. On motion for judgment by W on the ground that the rights of the parties were determined by the judgment in the first case, it was held that the decision in the earlier case was determinative not only of the actual matter there adjudicated, but of all other matter there in issue and which might have been adjudicated therein, and priority was awarded to W in the second interference on the ground of *res adjudicata*.

In another case an interference had been declared between A and H. Upon the evidence presented priority was awarded to A. H canceled claims corresponding to the issue, but was permitted to go to patent with other claims only slightly different from those constituting the issue, and the most of which clearly read upon A's disclosure. After the patent issued

A copied these claims and demanded a second interference. The Examiner refused to declare the same, but the Commissioner directed that the interference be instituted. Without waiting for the filing of preliminary statements A moved for judgment on the ground of *res adjudicata*. The motion was granted and judgment rendered in his favor as to the issue of the second interference on the ground that the subject-matter thereof was, in effect, in issue in the earlier case, and the question of the rights of the parties with respect to these claims was determined by the decision in the earlier proceeding.

Evidence (Three or More Parties.)

In interferences involving three or more parties some unusual questions with respect to the introduction of evidence arise. If all junior parties allege dates of conception prior to the senior party's filing date, the case is perfectly simple. Times for the taking of testimony are set for all parties in order. But where certain of the junior parties fail to overcome the filing dates of some or all of those who are senior, an unusual situation may be created.

Take, for instance, the three-party case. We may have, first, a case in which the junior party fails to overcome the filing date of either of the other parties; or, second, where he fails to overcome the senior party only; or, third, a case in which the intermediate party fails to overcome the senior party. Any party failing to overcome any senior party is placed under an order to show cause on or before a time specified why judgment should not be entered against him upon the record.

In the first case, if the junior party moves to dissolve, he should proceed against both senior parties, for if he eliminates one only, the other will still stand as a bar to his right to a patent. If it is held on motion to dissolve that both parties can make the claim, the junior party may then have the case set for final hearing under the provisions of Rule 130, in order that he may argue this same question as a basis for an award to himself. But under such circumstances the case will not be at once set for hearing, because the intermediate party, having alleged conception prior to the senior party's filing date, is entitled to take proofs upon this question.

Times for the taking of testimony between these parties only will therefore be set, but the junior party will be permitted to remain in the case until the same comes on for final hearing, so that all the questions may be argued and determined at one hearing. When the case comes on for final hearing, if it be found that neither of the other parties can make the claim, the award of priority will be to the junior party. If, however, it be found that either can make the claim, the junior party can not prevail.

In the second case, where the junior party overcomes the intermediate party, but fails to overcome the senior party, a different situation is presented. Here the motion to dissolve need attack the right of the senior party only to make the claim. If he succeeds in eliminating such party he will be entitled, as a matter of course, to take testimony with respect to the intermediate party. If, however, the interference is not dissolved and the senior party remains in the case, the standing of the junior party is somewhat anomalous. He is under an order to show cause why judgment should not be entered against him, with the senior party standing as an apparent bar. But if he should succeed at final hearing in showing that the senior party can not in fact make the claims, he is entitled then to contest the question of priority with the intermediate party. This situation not infrequently occurs. If the junior party asks to have the question of the senior party's right to make the claim argued at final hearing, he will be permitted to remain in the case; and since he may establish his contention that the senior party can not make the claims, he will be permitted to take testimony to establish his rights with respect to the intermediate party. Thus all possible questions will be disposed of at the same time. The practice therefore is to set times for the taking of testimony as between all three parties, so that all the evidence can be presented at one hearing.

In the third case, if the intermediate party moves to dissolve on the ground that the senior party can not make the claims, and such motion is denied, he likewise may argue this same question at final hearing as a basis for an award to himself. If he requests

to be heard upon this question, times will be set for all three parties to take testimony; for should he succeed in showing that the senior party can not make the claims, he will be in position to contest priority with the junior party.

Inoperativeness.

It sometimes happens that the operativeness of a party's disclosure is attacked by one of the other parties to the proceeding. This question should first be raised, if possible, by motion to dissolve. If the law examiner holds the structure to be operative, the other party not infrequently desires to take testimony to establish his contention. Numerous cases have arisen in which such testimony has been introduced. The experience of the Office is, however, that unless the invention is involved or abstruse, such evidence is of comparatively little value. In ordinary mechanical cases, the operation of which can at once be understood, evidence upon the question of operativeness is seldom of any substantial use.

Where the junior party has alleged conception prior to the senior party's filing date, and is therefore entitled to take testimony on the question of priority proper as a matter of course, he may, while introducing his testimony on the main question, take testimony also on the question of operativeness. No special permission to take such testimony need be secured. If evidence is introduced which is of such a character as to be useless in the final disposition of the case, the same will be simply disregarded, or struck out on motion. But in those cases in which the junior party has failed to overcome the senior party's filing date, and desires to take testimony on the question of operativeness of his opponent's structure, he must secure special permission to do so (Lowry and Cowley *vs.* Spoon, 1906 C. D., 224; Browne *vs.* Stroud, 1906 C. D., 226). A motion for permission to take such testimony is necessary, and the same must be accompanied by a satisfactory showing under oath, setting forth generally the facts which it is proposed to prove, and the witnesses who will be called to establish these facts. This is necessary in order that the Office may know that the same will be fact testimony and useful, and not merely the opinion of experts upon questions which the tribunals must de-

cide for themselves. Where, therefore, a party desires to take testimony upon such questions, the affidavits in support of the motion should make it clear, generally at least, what the moving party proposes to establish.

Evidence in Foreign Countries.

Generally speaking, acts done in a foreign country are not available as evidence in support of a claim of priority in this country. But when the question is that of originality, it may be necessary to secure the testimony of parties living abroad. And where parties seek the benefit of foreign filing dates under the provisions of Section 4887 of the Revised Statutes, it sometimes becomes necessary to establish the facts by testimony. If the witnesses can not be brought to this country, or where the expense and trouble of doing so would involve hardship greatly in excess of that sustained by an opponent in taking the testimony abroad, the testimony may be taken in the countries where the witnesses live.

Under the authority of Section 4905 of the Revised Statutes, authorizing the Commissioner of Patents to make rules for the taking of testimony generally, a special rule has been promulgated for taking testimony abroad (Rule 158). The practice adopted is the same as that used generally by the courts to secure testimony in a foreign country. Two methods are in use; first, by a commission directed to some consular or diplomatic officer of the United States residing in the country where the witnesses are located; and, second, by letters rogatory addressed to a court of competent jurisdiction in the country where the witnesses live.

The number of cases in which testimony had to be taken abroad was formerly quite large. But since the decision of the Commissioner in the case of Steel and Steel *vs.* Myers, 205 O. G., 1021, which permits a party to take advantage of any foreign application by motion to shift the burden of proof under circumstances recited in the decision, the cases wherein it has been necessary to take testimony in foreign countries have been much lessened.

In any case permission to take the testimony must first be secured by motion duly made and noticed upon

the other party. When it is shown that the testimony is necessary and probably will be useful, permission to take the same will be granted, and the taking of testimony in this country suspended, unless the parties otherwise agree. The commission is transmitted by the Commissioner of Patents through the Department of State to the officer to whom it is directed. After the testimony is taken it is returned to the State Department, and by that Department transmitted to the Patent Office.

When it becomes necessary to take the testimony of witnesses in Germany, a commission is not admissible unless the witnesses will testify voluntarily. The courts will not compel their attendance. Therefore, while commissions are sometimes issued to consuls or other United States representatives in Germany, this is only done where it is known in advance that the witnesses are friendly and will probably testify of their own free will. Because of this uncertainty, letters rogatory are quite commonly used instead. These are directed to the court having jurisdiction over the witnesses, requesting that steps be taken to secure the necessary evidence. These letters are transmitted through the State Department to the American Ambassador, who forwards them to the German Foreign Office with a request for their execution. At that point they pass to the control of the German officials, are transmitted to the proper court, and, when executed, are returned through the same channels.

The Department of State requires in all cases a deposit of at least $100 before the commission or letters rogatory are transmitted. After the evidence is returned, any surplus remaining is, of course, returned to the depositor.

Conclusion.

Illustrations might be greatly multiplied, but those given will serve to indicate to some extent the variety and character of questions, merely incidental or collateral to priority proper, which are presented for consideration and determination. Many of the questions raised in an interference are identical with those which may be raised in an infringement suit, but there are others arising more or less frequently which never occur in a suit in the federal courts.

Interferences as the same arise in the Patent Office have been given much consideration, and there is perhaps no branch of the patent law concerning which there is greater difference of opinion. Some persons advocate the entire abolition of interferences in the Office, arguing that the whole matter should be left to the courts, while others prefer to have the statute remain as it now is. Between these extremes many proposed modifications of the existing law have been suggested. The subject is an inherently complex one. The very fact that there has been so much discussion by men well informed and competent to criticize, but that the law nevertheless remains as it was in 1870, is in itself sufficient evidence of the difficulties in the way of any radical change.

Fundamentally, the system is a just one, for it aims to secure the rights of the party who is in fact and in law entitled to such protection. The Constitution itself, in giving to Congress authority to legislate upon the subject, delegated broad powers; but nevertheless introduced certain limitations which must be taken into consideration. In the first place Congress is authorized to secure to inventors only the exclusive control of their creations, and even this control must be for a limited time. In other words, it was apparently the intention of the makers of the Constitution that the reward should be to the party who in truth and in fact produced the invention; therefore before any patent can be granted to any one of two or more parties claiming the same invention, it is necessary to determine who was in fact the first inventor.

This fact appears to have been early recognized; for while the original law of 1790 made no reference to conflicting applications, the law of 1793, which supplemented that of 1790, contained a very carefully worded section relating thereto. The applications are here called "interfering" applications, and this is apparently the first time in which the expression occurs. The method of determination specified by the statute was that of arbitration. Even at that early date it was recognized that there might be more than two so-called interfering applications, and the statute particularly set forth how the arbitrators should

be selected, both where there were two conflicting applications and where there were more than two. The section of the statute to which reference has been made, reads as follows:

> Section 9. And be it further enacted, That in case of interfering applications, the same shall be submitted to the arbitration of three persons, one of whom shall be chosen by each of the applicants, and the third person shall be appointed by the Secretary of State; and the decision or award of such arbitrators, delivered to the Secretary of State in writing, and subscribed by them, or any two of them, shall be final, as far as respects the granting of the patent. And if either of the applicants shall refuse or fail to choose an arbitrator, the patent shall issue to the opposite party. And where there shall be more than two interfering appplications, and the parties applying shall not all unite in appointing three arbitrators, it shall be in the power of the Secretary of State to appoint three arbitrators for the purpose.

This was the law until 1836, when general changes in the patent system were made. The law of 1836, in so far as it related to interferences, remained in force until 1870, and Section 42 of the law of 1870 is in substance identical with Section 4904 of the Revised Statutes, now in force. A short history of the laws relating to interferences may be found in the decision of Commissioner Duell in the case of Little *vs.* Lillie *et al.*, 1876 C. D., 207.

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